UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware corporation dba BLACKWATER WORLDWIDE, Plaintiff, vs. KELLY BROUGHTON, in his capacity as Director of the Development Services Department of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, an agency of the City of San Diego; AFSANEH AHMADI, in her capacity as the Chief Building Official for the City of San Diego; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, inclusive, Defendants.	CASE NO. 08-CV-0926 H (WMC) **ORDER DENYING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

On May 23, 2008, plaintiff Blackwater Lodge and Training Center ("Plaintiff") filed a complaint against the City of San Diego ("City"), the Development Services Department of the City of San Diego and Kelly Broughton, that agency's director, and the City's Chief Building Official (collectively, "Defendants"). (Doc. No. 1.) Presently before the Court is a motion to dismiss Plaintiff's complaint, filed by Defendants on June 23, 2008. (Doc. No. 36.) On July 28, 2008, Plaintiff filed a response in opposition. (Doc. No. 45.) Defendants filed a reply on August 4, 2008. (Doc. No. 48.) Both parties have filed requests for judicial notice, see Doc. Nos. 36-3, 46, which the Court grants. See Fed. R. Evid. 201; Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

On August 7, 2008, the Court submitted Defendants' motion pursuant to the Court's discretion under Local Civil Rule 7.1(d)(1). (Doc. No. 50.) The Court continues to conclude that Defendants' motion is appropriate for resolution without oral argument. For the following reasons, the Court denies Defendants' motion to dismiss Plaintiff's complaint.

Background

Plaintiff's complaint alleges that Plaintiff has a contract with the United States Navy to provide training to Navy sailors. (Compl. ¶¶ 1, 20.) Plaintiff secured the rights to use a facility in the Otay Mesa area of San Diego. (Id. ¶ 1.) Plaintiff's complaint arises out of Plaintiff's efforts to modify that facility and ultimately use it for training consistent with Plaintiff's contract with the Navy. (Id.) Plaintiff alleges that pursuant to the City's municipal code, its project is subject to ministerial review and therefore must be approved once it is determined that the modifications covered by the permit applications comply with building codes, safety regulations and other laws. (Id. ¶¶ 3 n. 1, 6, 25.) Plaintiff asserts that review has been completed with respect to several permits, that the Building Official has approved the issuance of a certificate of occupancy consistent with those permits, yet Defendants refuse to actually issue the certificate of occupancy.

Plaintiff alleges that it submitted to the City applications for building permits required under the San Diego Municipal Code ("SDMC") to modify the facility by adding internal walls, air conditioning units and a firing range. (Id. ¶¶ 1, 27-31.) Plaintiff alleges that the City granted those permit applications. (See id. ¶¶ 28, 30.) The complaint alleges that the City conducted the inspections prescribed by the SDMC and approved the facility's electrical and safety infrastructure. (Id. ¶¶ 41, 42.) On April 30, 2008, the Building Official allegedly inspected the structure and found no violations of the Land Development Code or other applicable laws and regulations. (Id. ¶¶ 41-42.) Plaintiff alleges that on April 30, 2008, the Building official approved the issuance of a certificate of occupancy consistent with the building permit applications that the City already had granted. (Id. ¶ 42.) The complaint alleges that, once the Building Official formally approved the certificate, all that remained was the ministerial act of sending the certificate to Plaintiff. (Id. ¶ 43.) Plaintiff alleges that the SDMC and state law imposes a mandatory duty for the City to issue the certificate of occupancy. (Id.)

The complaint alleges, however, that after the Building Official approved the issuance of a certificate of occupancy, the City refused to send the certificate of occupancy to Plaintiff. (See id. ¶¶ 3, 45.) On May 16, 2008, the City Attorney allegedly issued a legal memorandum stating that Plaintiff's project should be subject to "discretionary" review by Defendants before the issuance of a certificate of occupancy. (Id. ¶ 48.) On May 19, 2008, the Director of the City's Development Services Department allegedly informed Plaintiff that the City would not issue a certificate of occupancy to Plaintiff for the Otay Mesa facility. (Id. ¶¶ 5, 49-53.) Plaintiff alleges that Defendants failed to give Plaintiff notice and an opportunity to be heard before refusing to issue the certificate of occupancy that the Building Official allegedly already had approved. (Id. ¶¶ 5, 69.)

Plaintiff's complaint asserts claims for violations of procedural due process under 42 U.S.C. § 1983; equal protection under 42 U.S.C. § 1983; the dormant Commerce Clause, U.S. Const., Art. 1 § 8; procedural due process under the California Constitution, Article I § 7(a); and equal protection under the California Constitution, Article I § 7(a). Plaintiff's complaint also seeks injunctive and declaratory relief. On June 17, 2008, the Court granted Plaintiff's motion for a preliminary injunction. (Doc. No. 32.) The issue was fully briefed by both sides and, after a hearing, the Court concluded that Plaintiff demonstrated a strong likelihood of success on the merits of its claims, and that Plaintiff met the requirements for preliminary injunctive relief. (Id.) The Court noted that Plaintiff's position appeared to find substantial support in the City's own Audit Report, which was released one day after the Court granted Plaintiff's motion for a temporary restraining order. (Id.)

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Discussion

I. Ripeness

As a threshold matter, Defendants contend that Plaintiff's claims are not ripe for review by this Court. Ripeness is related to the Article III requirement of a case or controversy, which requires a plaintiff to show (1) that it has suffered an injury in fact that is concrete as well as actual or imminent, not merely conjectural or hypothetical; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 180-81 (2000). The Court notes that Defendants do not dispute that those requirements are satisfied. "The purpose of the ripeness doctrine is to avoid premature judicial review of administrative action. This goal is accomplished by deferring review of a planning commission's land use decisions until they represent a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." St. Clair v. City of Chico, 880 F.2d 199, 202 (9th Cir. 1989).

Here, the Court concludes that Plaintiff's claims are ripe for review. As the record in this case makes clear, Defendants have reached a final, definitive position regarding how they will apply the regulations at issue to the land in question. St. Clair, 880 F.2d at 202. Defendants seek to require Plaintiff's project to go through additional "discretionary" review, and Defendants' position is formally expressed in a May 19, 2008 letter to Plaintiff from the City's Director of Development Services. (See Compl. ¶ 5.) The record also makes clear that Defendants have implemented the decision expressed in that letter, since Defendants refused to issue a certificate of occupancy to Plaintiff. The complaint asserts that Defendants have no legal justification for imposing additional review on Plaintiff's project, and the Court rejects Defendants' contention that Plaintiff's complaint is not ripe for review until that additional review occurs. It is clear that Plaintiff's complaint alleges harm from "discrete events that have already occurred." Truth v. Kent Sch. Dist., 524 F.3d 957, 966 (9th Cir. 2008). Accordingly, after considering the purpose of the ripeness requirement as well as "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration," see id. at 966, the Court concludes that Plaintiff's claims are ripe for review by this Court.

II. Motion to Dismiss – Legal Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits dismissal of a claim either where that claim lacks a cognizable legal theory, or where insufficient facts are alleged to support plaintiff's theory. See Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). In resolving a Rule 12(b)(6) motion, the court construes the complaint in the light most favorable to the plaintiff and accepts as true all well-pleaded factual allegations. See Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th Cir. 1996). However, to survive a Rule 12(b)(6) motion a complaint must contain factual allegations sufficient "to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, ___ U.S. ___, 127 S.Ct. 1955, 1965 (2007).

III. Plaintiff's Procedural Due Process Claims

Procedural due process dictates that "[b]efore a person is deprived of a protected interest, he must be afforded opportunity for some kind of hearing." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570 n. 7 (1972). To state a procedural due process claim, a plaintiff must allege the deprivation by a government actor of a "protected interest." Id. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Id. at 569. Protected property interests "are not created by the Constitution" itself; rather, a plaintiff must allege a protected interest created "by existing rules or understandings that stem from an independent source such as state law– rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Id. at 577.

Here, the Court concludes that Plaintiff's complaint sufficiently alleges the deprivation by government actors of a protected property interest. The complaint alleges that Plaintiff successfully applied for several building permits and passed the Building Official's final inspection related to those permits. After completing the final inspection, the Building Official allegedly approved the issuance of a certificate of occupancy. (Compl. ¶ 42.) The complaint alleges that the Building Official stamped the plans for Plaintiff's facility and stated, "everything looked good. I can't not sign these plans." (Id.) Once that occurred, the complaint alleges that the City's own municipal code, as well as state law, imposed on the City a mandatory duty to perform the ministerial act of sending to Plaintiff the certificate of occupancy. (Id. ¶ 43.) Accordingly, the Court concludes that Plaintiff's complaint sufficiently alleges the existence of a protected property interest within the meaning of the Fourteenth Amendment. Board of Regents of State Colleges v. Roth, 408 U.S. at 577.

The Court rejects Defendants' contention that Plaintiff did not yet have a property interest worthy of protection. This contention is premised on Defendants' argument that Plaintiff's project in fact is subject to discretionary review. On a motion to dismiss, however, the Court is limited to the well-pleaded allegations of the plaintiff's complaint, which the Court must accept as true for purposes of this motion. Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899-900 (9th Cir. 2007). Here, the complaint alleges that Plaintiff's project was subject to only ministerial review. The complaint alleges specific facts supporting that assertion. Plaintiff alleges that with respect to several specific permits it completed the process of ministerial review and that, having done so, it was entitled under state and local law to receive a certificate of occupancy consistent with those permits. See SDMC § 129.0114. The Court emphasizes that Plaintiff's claim does not challenge the discretionary decision to grant or deny a permit application. Plaintiff alleges that certain building permit applications had been granted, and that the corresponding certificate of occupancy was approved, but that the City subsequently refused to actually issue the certificate. See Inland Empire Health Plan v. Superior Court, 108 Cal. App. 4th 588, 593 (2003) ("a city has a mandatory duty to issue a certificate of occupancy once it has found that a construction project has complied with all requirements").

Based on the foregoing, the Court concludes that Plaintiff adequately alleges a protected property interest created by an independent source, as well as Plaintiff's entitlement to that property interest. See Board of Regents of State Colleges v. Roth, 408 U.S. at 577. Plaintiff alleges that Defendants deprived Plaintiff of that protected property interest without sufficient notice or opportunity to be heard. See Sanchez v. City of Santa Ana, 915 F.2d 424, 429 (9th Cir. 1990). Accordingly, the Court concludes that Plaintiff's complaint states a claim on which relief can be granted for violations of Plaintiff's right to procedural due process. Fed. R. Civ. P. 12(b)(6). The Court denies Defendants' motion to dismiss Plaintiff's procedural due process claims.

IV. Plaintiff's Equal Protection Claims

The equal protection provisions of the federal and state constitutions prohibit government from treating similarly situated individuals differently. See City of Cleburne v. Cleburne Living Center,473 U.S. 432, 439 (1985); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973). Therefore, a plaintiff must plead that it was treated differently from other similarly situated individuals or entities. The degree of judicial scrutiny to which the different treatment will be subjected, however, depends on the type of classification and/or the importance of the right burdened. "Absent a suspect classification or the infringement of a fundamental right, neither of which are present here, the equal protection clause is offended only if the City's different treatment of [Plaintiff] bears no rational relationship to a legitimate governmental purpose." Parks v. Watson, 716 F.2d 646, 654 (9th Cir. 1983).

Here, the Court concludes that Plaintiff's complaint adequately alleges claims for violations by Defendants of Plaintiff's right to the equal protection of the law. Plaintiff alleges that it seeks to operate a target range to train Navy sailors in marksmanship. (Compl. ¶ 74.) Plaintiff alleges that pursuant to a ministerial process it applied for various building permits necessary to construct that firing range in its Otay Mesa facility. Plaintiff alleges that, after all necessary permits were approved, Defendants refused to issue a certificate of occupancy consistent with those permits until Plaintiff completes a "discretionary" review process proposed by Defendants. (Compl. ¶¶ 74, 75.) Plaintiff alleges that Defendants have not subjected similar firing ranges and/or vocational schools to this discretionary review. (Id. ¶ 75.) Plaintiff alleges that Defendants have not articulated a rational basis for this disparate treatment and, in fact, that Defendants' refusal to issue the certificate of occupancy violates the City's own municipal code. (Id. ¶ 76.)

The Court concludes that these allegations suffice to state an equal protection claim. Although Defendants contend that the City's interest in reviewing Plaintiff's use of the Otay Mesa facility is rationally related to a legitimate governmental interest, the present motion to dismiss evaluates the sufficiency of Plaintiff's allegations, which are accepted as true for purposes of the motion. Whether Defendants in fact treated Plaintiff differently than other similarly situated applicants and, if so, whether Defendants had a rational basis for the disparate treatment, are factual issues that are irrelevant on a motion to dismiss. Accordingly, the Court denies Defendants' motion to dismiss Plaintiff's complaint with respect to Plaintiff's equal protection claims. Defendants' contentions are better addressed at the summary judgments stage.

V. Plaintiff's Commerce Clause Claim

Under Plaintiff's Commerce Clause claim, the court "ask[s] whether a challenged law discriminates against interstate commerce." Dept. of Revenue of Kentucky v. Davis, ___ U.S. ___, 128 S.Ct. 1801, 1808 (2008). "A discriminatory law is virtually per se invalid, and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." Id. "Absent discrimination for the forbidden purpose, however, the law will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits." Id. at 1808-1809.

Here, the Court concludes that Plaintiff's complaint states a claim for a violation of the Commerce Clause. As Defendants acknowledge (see Defs.' Mem. of Pts. & Auths. ISO Mot. to Dismiss Plf's. Compl. at 22), Plaintiff, a Delaware corporation with its principal place of business in North Carolina, alleges that it is being treated differently because it is an out of state entity. (See Compl. ¶¶ 10, 85.) The complaint asserts that Defendants have imposed regulatory measures on Plaintiff in a manner designed to benefit in-state economic interests by burdening out-of-state competitors. (Id. ¶ 87.) Specifically, Plaintiff alleges that Defendants seek to require Plaintiff to submit its project to a discretionary review process that Defendants have not required of any other firing range or vocational school in the City. (Id. ¶ 85.) Defendants argue that it has not singled Plaintiff out for disparate treatment based on its out-of-state status. (See Defs.' Mem. Pts. & Auths. ISO Mot. to Dismiss Plf's. Compl. at 22-23.) As with Plaintiff's equal protection claims, however, this is a factual issue not appropriate for resolution on a motion to dismiss.

Defendants point out that Plaintiff's building permit applications were submitted by local entities, and argue that this dooms Plaintiff's allegation that it has been discriminated against as an out-of-state corporation. The Court notes, however, that the complaint alleges that those permits were granted pursuant to a routine ministerial process, and that Defendants decided to withhold the certificate of occupancy only after it was discovered that Plaintiff was the real party in interest seeking to use the Otay Mesa facility. (See Compl. ¶ 4.) This makes Plaintiff's Commerce Clause claim at least "plausible," see Twombly, 127 S.Ct. at 1965, and therefore sufficient to survive a Rule 12(b)(6) motion to dismiss. Based on the foregoing, the Court concludes that Plaintiff's complaint adequately alleges a claim for violation of the Commerce Clause. The Court denies Defendants' motion to dismiss Plaintiff's complaint with respect to that claim.

V. Abstention

Defendants argue that the Court should abstain from adjudication on Plaintiff's complaint pursuant to so-called "Pullman abstention," see Railroad Commission of Tx. v. Pullman Co., 312 U.S. 496 (1941) and/or "Younger abstention," see Younger v. Harris, 401 U.S. 37 (1971). For the reasons that follow, the Court concludes that abstention is not warranted in this case.

A. Pullman Abstention

Pullman abstention may be appropriate when "a case touche[s] a sensitive area of social policy, [a] state decision could obviate the need for federal constitutional adjudication, and any federal construction of the state law might, at any time, be upended by a decision of the state courts." Smelt v. County of Orange, 447 F.3d 673, 679 (9th Cir. 2006). The Ninth Circuit recently stated three requirements that must be shown before the Pullman abstention doctrine can be invoked: "(1) [t]he complaint touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open; (2) [s]uch constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy; and (3) [t]he possibly determinative issue of state law is doubtful." Smelt, 447 F.3d at 679. Abstention is not a question of federal jurisdiction– "it is ultimately a question of the exercise of discretion." Id.

Here, after careful consideration of the entire record and the arguments by both sides, the Court concludes that Defendants fail to establish that Pullman abstention is warranted. First, the Court concludes that Defendants fail to demonstrate the existence of a doubtful (and potentially determinative) issue of state law. Smelt, 447 F.3d at 679; see Pullman, 312 U.S. at 498-500. Plaintiff's claims are premised on the theory that once an applicant meets the requirements for certain building permits (and the permits are in fact granted), a municipality cannot arbitrarily refuse to actually issue a certificate of occupancy consistent with the permits. This theory finds support in state law as well as Defendants' own municipal code. See SDMC § 129.0114 (once requirements are met, city "shall" issue certificate of occupancy); Thompson v. City of Lake Elsinore, 18 Cal. App. 4th 49, 57 (1993) (once a building permit has been issued, it cannot be de facto revoked by the simple expedient of never issuing the certificate of occupancy" (emphasis in original)).

Additionally, the Court concludes that Defendants fail to demonstrate that a determination of an issue of state law would narrow or "reduce the contours" of this litigation. Smelt, 447 F.3d at 679; see Cinema Arts, Inc. v. Clark County, 722 F.2d 579, 580 (9th Cir. 1983); C-Y Dev. Co. v. City of Redlands, 703 F.2d 375, 380 (9th Cir. 1983). This is because the circumstances of this case differ significantly from the cases where Pullman abstention has held to be appropriate. E.g., Smelt, 447 F.3d at 679-82 (abstention granted "based on pending litigation in the California state courts"). Instead of requesting abstention so that a neutral state judicial or administrative decision maker has the opportunity to resolve a doubtful issue of state law in a way that might obviate the need for federal litigation, here Defendants ask the Court to abstain so that the City itself may subject Plaintiff's project to "further review." (See Defs.' Mem. Pts. & Auths. ISO Mot. to Dismiss Plf's. Compl. at 9.) Ironically, this would exacerbate the very problem that gave rise to Plaintiff's complaint– Plaintiff alleges that the City has arbitrarily decided to subject its project to additional (and still unspecified) "discretionary" review, without any basis in state law or the City's own municipal code for doing so.

In sum, the Court concludes that Defendants fail to establish that a state decision could obviate the need for federal constitutional adjudication or that any federal adjudication of a state issue might, at any time, be upended by a decision of the state courts. Smelt v. County of Orange, 447 F.3d 673, 679 (9th Cir. 2006). "Pullman abstention is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it." Cinema Arts, Inc., 722 F.2d at 580. The Court concludes that this is not the case for Pullman abstention. Based on the allegations of Plaintiff's complaint and the standards of law applicable to a motion to dismiss, Plaintiff has stated several federal claims that do not warrant abstention by this Court.

B. Younger Abstention

"Before Younger abstention can be applied to dismiss a federal claim, three requirements must be met: (1) there must be ongoing state judicial proceedings, (2) the state judicial proceedings must implicate important state interests, and (3) the state judicial proceedings must afford the federal plaintiff an adequate opportunity to raise constitutional claims." Agriesti v. MGM Grand Hotels, Inc., 53 F.3d 1000, 1001 (9th Cir. 1995). "All three elements of Younger must be present in order for abstention to be appropriate." Id.; see Benavidez v. Eu, 34 F.3d 825, 831 (9th Cir. 1994).

Here, the Court concludes that Younger abstention is not warranted because there are no "ongoing state judicial proceedings." Agriesti, 53 F.3d at 1001. The Younger doctrine originated in a case where the ongoing state proceeding was a criminal action. Younger v. Harris, 401 U.S. 37 (1971). It is true that the courts "have expanded Younger beyond criminal proceedings, and even beyond proceedings in courts," but the Supreme Court has "never extended it to proceedings that are not 'judicial in nature.'" New Orleans Pub. Serv. Inc. v. Council of the City of New Orleans, 491 U.S. 350, 368 (1989). The Ninth Circuit has upheld Younger abstention based on ongoing state administrative proceedings, but in doing so specifically noted that the proceedings were both "quasi-judicial" and "quasi-criminal." Baffert v. Cal. Horse Racing Bd., 332 F.3d 613, 618 (9th Cir. 2003). Neither is true in this case.

Here, it is undisputed that no ongoing state judicial proceedings exist. Defendants, however, contend that a still-pending building permit application that Plaintiff submitted to the City after the complaint in this case was filed requires abstention under the Younger doctrine. Under all the circumstances of this case, the Court concludes that Younger abstention is not warranted or appropriate. Defendants fail to demonstrate that the pending application is the subject of ongoing "quasi-judicial" and/or "quasi-criminal" state proceedings, much less "judicial" proceedings. Baffert v. Cal. Horse Racing Bd., 332 F.3d at 618; see Agriesti, 53 F.3d at 1001. Additionally, even assuming that any ongoing proceedings "implicate important state interests," Defendants fail to demonstrate that those proceedings "afford the federal plaintiff an adequate opportunity to raise constitutional claims." Agriesti, 53 F.3d at 1001. Indeed, it would be difficult, if not impossible, for ongoing proceedings before the City itself to provide Plaintiff an adequate opportunity to raise its federal claims, since the City's attempt to subject Plaintiff's project to additional review after the City allegedly approved Plaintiff's certificate of occupancy forms the very basis of Plaintiff's federal claims.

For the reasons discussed above, the Court concludes that neither Pullman nor Younger abstention is proper in this case.

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VI. California Government Claims Act

Pursuant to the California Government Claims Act, "no suit for money or damages may be brought against a public entity on [certain causes of action] until a written claim therefor has been presented to the public entity . . . in accordance with" the provisions of the Act. Cal. Govt. Code § 945.4. Defendants argue for dismissal of Plaintiff's claims for failure to submit a written claim prior to filing suit as directed by the Claims Act. The Court denies Defendants' motion to dismiss on this ground.

First, the Court concludes that Plaintiff's federal claims under § 1983 are not subject to any pre-suit requirements set forth in the Claims Act. Federal law does not require compliance with a pre-suit claim process, and state law cannot circumscribe a plaintiff's right to sue under federal law by requiring compliance with such a process. See Felder v. Casey, 487 U.S. 131, 153 (1988); Steffel v. Thompson, 415 U.S. 452, 472-73 (1974); Ellis v. City of San Diego, 176 F.3d 1183, 1191 (9th Cir. 1999) (section 1983, "which exists to vindicate important federally created rights, preempts state notice-of-claim statutes").

Second, the Court concludes that dismissal of Plaintiff's state law claims for failure to comply with the Government Claims Act is not warranted. Under California law, the Claims Act does not apply where the primary relief sought is injunctive or declaratory relief and where money damages (if any) are merely incidental. E.g., Eureka Teacher's Assn. v. Bd. of Educ., 202 Cal. App. 3d 469, 475 (1988). The Court concludes that is the case here. Although Plaintiff's complaint includes a prayer for damages, the Court concludes for purposes of this motion to dismiss that with respect to Plaintiff's state law claims, the primary relief sought by Plaintiff is injunctive and/or declaratory relief, and any money damages are merely incidental. Accordingly, the Court denies Defendants' motion to dismiss for failure to comply with the Government Claims Act.

Conclusion

The Court acknowledges that Defendants raise numerous arguments in support of their contention that Plaintiff's project in fact can be subjected to discretionary review. On the present motion to dismiss, however, the Court asks only whether Plaintiff's allegations, taken as true, are sufficient to state a claim on which relief can be granted. For the reasons discussed above, the Court concludes that Plaintiff's allegations are sufficient to survive a motion to dismiss under Rule 12(b)(6). Accordingly, the Court denies Defendants' motion to dismiss Plaintiff's complaint.

IT IS SO ORDERED.

DATED: August 11, 2008

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT